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CLERK, IDAHO

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO**

POCATELLO DENTAL GROUP, P.C.,
an Idaho professional corporation,

Plaintiff,

vs.

INTERDENT SERVICE
CORPORATION, a Washington
corporation,

Defendant.

Case No. CV-03-450-E

**MEMORANDUM SUPPORTING
MOTION TO QUASH
SUBPOENA DUCES TECUM**

Dwight G. Romriell, through his counsel, has moved the Court for its order quashing the Subpoena Duces Tecum served on Dr. Romriell about 2:05 p.m. on Monday, November 10, 2003 requiring appearance at 9:00 a.m. on Tuesday morning, November 11, 2003. The Motion and supporting Declarations of Dr. Romriell and counsel have been previously filed.

The short-notice Subpoena Duces Tecum set forth 16 categories of documents subject to two pages of definitions. Copies of the Subpoena were attached to

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the Motion to Quash and the Declaration of Dr. Romriell. The Declarations of Dr. Romriell and his counsel explained that the duces tecum portion of the subpoena was so broad that Dr. Romriell would have to essentially "box-up" and deliver his entire office documentation to the deposition:

"In order to comply with the Subpoena Duces Tecum I would have to essentially "box-up" my office and deliver it to the deposition. It would take many, many hours just to assemble, transport to the deposition, and return to my office all that documentation to my office." — **Declaration of Dwight G. Romriell, ¶ 6 (11-10-03); See also, Declaration of Counsel, ¶ 5(a) (11-10-03)**

The Declaration of Dr. Romriell's counsel further explained time constraints related to a trial starting next week in Idaho Falls (Declaration of Counsel, ¶ 6), the unwillingness of defense counsel to professionally compensate Dr. Romriell for the deposition (Declaration of Counsel, ¶ 5), the uncertainty of issues by virtue of non-complying "Counterclaims" against non-party individuals (Declaration of Counsel, ¶ 9), the absence of a *Local Rule* 16.1 Discovery and Litigation Plan on file (Declaration of Counsel, ¶ 10), and that efforts to secure an agreement from defense counsel to limit the deposition time and issues to the areas of announced disagreement were unsuccessful:

"However, defense counsel have been unwilling to make any agreement that would limit the time or define the issues to be covered in a deposition despite my offer to allow a further deposition later on issues not needed to be covered for the upcoming hearing."

— **Declaration of Counsel, ¶ 7 (11-10-03)**

ARGUMENT

Rule 45(c), *Federal Rules of Civil Procedure*, requires certain cautionary language of Rule 45(c) to be reprinted on every subpoena. The heading for Rule 45(c) is **“Protection of Persons Subject to Subpoenas.”** That language requires a party issuing a subpoena to take reasonable steps to avoid imposing undue burden and expense on another:

“A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. the court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.”

— **Rule 45(c)(1) *Federal Rules of Civil Procedure***

The courts have recognized that even “good faith” is *not* sufficient to avoid the *affirmative* duty to avoid imposing undue burdens on a subpoenaed witness; the issue is whether the issuing party took reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena. *Federal Deposit Ins. Corp. v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997); *Liberty Mutual v. Diamante*, 194 FRD 20, 23 (D. Mass. 2000).

CONCLUSION

When the unreasonably broad Subpoena Duces Tecum is looked at together with the artifice of filed “Counterclaims” against individual *non-parties* and the unwillingness of defense counsel to reasonably limit the deposition to disputed issues

relevant to the TRO hearing, it is evident there was, and is, an intent to harass and otherwise create an unnecessary burden on Dr. Romriell. The unwillingness of defense counsel to limit the time and issues to areas of announced disagreement relevant to the TRO hearing further evidences and express intent to take advantage. Sanction, including incurred attorney fees is appropriate.

RESPECTFULLY SUBMITTED this 11th day of November, 2003.

LOWELL N. HAWKES, CHARTERED



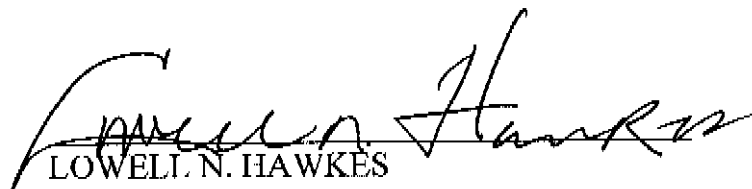
LOWELL N. HAWKES

CERTIFICATE OF SERVICE

I certify that on this 11th day of November 2003, I hand-delivered a copy of the foregoing to counsel for the parties as shown below:

James P. Price
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G. Rey Reinhardt
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Counsel for Defendant InterDent
• Hand delivered to the Echohawk Law
offices in Pocatello where the deposition
at issue was scheduled.



LOWELL N. HAWKES